

Traditional Knowledge and Intellectual Property



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The current international system for protecting intellectual property was fashioned during the age of enlightenment and industrialization and developed subsequently in line with the perceived needs of technologically advanced societies. However, in recent years, indigenous peoples, local communities, and governments, mainly in developing countries, have demanded equivalent protection for traditional knowledge. WIPO member states take part in negotiations within the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), in order to develop an international legal instrument (or instruments) that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection. Such an instrument could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it. Representatives of indigenous and local communities are assisted by the WIPO Voluntary Fund to attend the WIPO talks, and their active participation is crucial for a successful outcome. Background Brief No. 2 The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is available at www.wipo.int/publications/en/details.jsp?id=4682&plang=EN.

Traditional knowledge is not so-called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such, it is not easily protected by the current intellectual property system, which typically grants protection for a limited period to new inventions and original works by individuals or companies. Its living nature also means that “traditional” knowledge is not easy to define.

Recognizing traditional forms of creativity and innovation as protectable intellectual property may enable indigenous and local communities as well as governments to have a say over their use by others. This may make it possible, for example, to protect traditional remedies, artworks or music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.

Although the negotiations underway in WIPO are propelled mainly by developing countries, they are not neatly divided along “North-South” lines. Communities and governments do not necessarily share the same views, and some developed country governments, especially those with indigenous populations, are active.

Two angles to intellectual property protection exist:

- **Defensive protection** aims to stop people outside the community from *acquiring* intellectual property rights over traditional knowledge. India, for example, has compiled a searchable database of traditional medicine that can be used as evidence of prior art by patent examiners when assessing patent applications. This database was created following a well-known case in which the US Patent and Trademark Office had granted a patent (later revoked) for the use of turmeric to treat wounds, a property well known to traditional communities in India and documented in ancient Sanskrit texts. Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words, from being registered as trademarks by third parties.
- **Positive protection** is the granting and exercise of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. This can be achieved through the existing intellectual property system, and a number of countries have also developed specific legislation. However, any specific protection afforded under national law may not hold for other countries, one reason why many are advocating for an international legal instrument.

WIPO's work on traditional knowledge addresses three distinct yet related areas: traditional knowledge in the strict sense (technical know-how, practices, skills, and innovations related to, say, biodiversity, agriculture or health); traditional cultural expressions/expressions of folklore (cultural manifestations such as music, art, designs, symbols and performances); and genetic resources (genetic material of actual or potential value found in plants, animals and micro-organisms).

Although for many communities traditional knowledge, genetic resources and traditional cultural expressions form part of a single integrated heritage, from an intellectual property standpoint they raise different questions and may require different sets of solutions. In all three areas, in addition to work on an international legal instrument, WIPO is responding to requests from communities and governments for practical assistance and technical advice on how to make more effective use of existing intellectual property systems and to participate more effectively in the IGC's negotiations. WIPO's work includes assistance to develop and strengthen national and regional systems for the protection of traditional knowledge (policies, laws, information systems and practical tools) and other capacity-building initiatives.

Traditional knowledge

When community members innovate within the traditional knowledge framework, they may use the patent system to protect their innovations. However, traditional knowledge as such – knowledge that has ancient roots and is often informal and oral – is not protected by conventional intellectual property systems. This has prompted some countries to develop their own *sui generis* (specific, special) systems for protecting traditional knowledge, based on the kinds of measures, principles and values that make up comprise the intellectual property system. For more information on national policy and legislative options, see Background Brief No. 3 Developing a National Strategy on IP and TK, TCEs and GRs, available at www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_3.pdf.

There are also many initiatives underway to document traditional knowledge. In most cases the motive is to preserve or disseminate it, or to use it, for example, in environmental management, rather than for the purpose of intellectual property protection. There are nevertheless concerns that if documentation makes traditional knowledge widely available, especially if it can be accessed on the Internet, this could lead to misappropriation and use in ways that were not intended by its holders.

At the same time, documentation can help protect traditional knowledge, for example, by providing a confidential record reserved for the community only. Some formal documentation and registries of traditional knowledge support *sui generis* protection systems, while databases – such as India’s database on traditional medicine – play a role in defensive protection within the existing intellectual property system. It is important to ensure that documentation of traditional knowledge is linked to an intellectual property strategy and does not take place in a policy or legal vacuum. For more information on documentation, please see Background Brief no 9 Documentation of Traditional Knowledge and Traditional Cultural Expressions, available at www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_9.pdf.

Traditional cultural expressions

Traditional cultural expressions (folklore) are seen as integral to the cultural and social identities of indigenous and local communities, embodying know-how and skills, and transmitting core values and beliefs. Protecting folklore may contribute to economic development, encourage cultural diversity and help preserve cultural heritage.

Traditional cultural expressions can be protected by existing systems, such as copyright and related rights, geographical indications, trademarks and designs. For example, contemporary adaptations of folklore may be copyrightable, while performances of traditional music, dance or theater may come under the WIPO Performances and Phonograms Treaty or the Beijing Treaty on Audiovisual Performances. Trademarks can be used to identify authentic indigenous arts, as the Maori Arts Board in New Zealand, *Te Waka Toi*, has done. Some countries also have special legislation for the protection of folklore. Panama has established a registration system for traditional cultural expressions, while the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture gives “traditional owners” the right to authorize or prevent use of folklore and receive a share of the benefits from commercial exploitation.

Genetic resources

Genetic resources themselves are generally not considered “intellectual property” (they are not creations of the human mind). In considering the intellectual property aspects of the use of genetic resources, WIPO’s work complements the international legal framework that regulates the access to, and the sharing of benefits arising out of the utilization of genetic resources defined by the Convention on Biological Diversity (CBD), and its Nagoya Protocol, and the International Treaty on Plant Genetic Resources for Food and Agriculture of the United Nations Food and Agriculture Organization (FAO).

Inventions based on or developed using genetic resources (associated with traditional knowledge or not) may be patentable or protected by plant breeders’ rights. Some are concerned about patents being granted over such inventions, which do not fulfill the existing patentability requirements of novelty and inventiveness. To help patent examiners find relevant prior art and avoid the granting of patents in error, proposals have been made to set up genetic resources and traditional knowledge databases, and WIPO has improved its own search tools and patent classification systems. More controversially, some wish to have the possibility to disqualify patent applications that do not comply with CBD obligations on prior informed consent, mutually agreed terms, fair and equitable benefit-sharing, and disclosure of origin. A number of countries have enacted domestic legislation putting into effect these obligations and WIPO members are considering whether, and to what extent, the intellectual property system should be used to support them. Many, but not all, WIPO members want to make it mandatory

for patent applications to show the source or origin of genetic resources, as well as evidence of prior informed consent and a benefit sharing agreement.

Developing an international legal instrument

Because the existing international intellectual property system does not fully protect traditional knowledge and traditional cultural expressions, discussions are underway to develop an international legal instrument providing *sui generis* protection.

An international legal instrument would define what is meant by traditional knowledge and traditional cultural expressions, who the rights holders would be, how competing claims by communities would be resolved, and what rights and exceptions ought to apply.

In the WIPO negotiations, many argue that use of traditional knowledge ought to be subject to free, prior and informed consent, especially for sacred and secret materials. However, others fear that granting exclusive control over traditional cultures could stifle innovation, diminish the public domain and be difficult to implement in practice.

Working out the details is complex and there are divergent views on the best ways forward, including whether intellectual property-type rights are appropriate for protecting traditional forms of innovation and creativity.

To take just one example, communities may wish to control all uses of their traditional cultural expressions, including works inspired by them, even if they are not direct copies. Copyright law, on the other hand, permits building on the works of others, provided there is sufficient originality in the new creations. The text of the legal instrument will have to draw the line between legitimate borrowing and unauthorized appropriation.

On genetic resources, countries agree that intellectual property protection and the conservation of biodiversity should be mutually supportive, but differ on how this can be achieved and whether any changes to current intellectual property rules are necessary.

Further information

WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999),
www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf

Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview (WIPO Publication No. 933), www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf

Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions,
www.wipo.int/tk/en/resources/glossary.html

A series of Background Briefs prepared by WIPO on various topics,
www.wipo.int/tk/en/resources/publications.html

Database of legislative texts on the protection of traditional knowledge and traditional cultural expressions and legislative texts relevant to genetic resources, www.wipo.int/tk/en/legal_texts

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC),
www.wipo.int/tk/en/igc/index.html

More WIPO resources are available at
www.wipo.int/tk/en/resources/publications.html